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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 342

NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION,

Appellant,

vs.

GEORGE ARNOLD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

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NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION,

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vs.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Washington entered in this cause.

Opinion Below

The opinion of the Supreme Court of Washington is reported at 42 Wash. (2d) —; 142 Wash. Dec. 590. A copy of this opinion is attached hereto as Appendix "A."

Jurisdiction

The opinion of the Supreme Court of Washington was filed on May 26, 1953. A petition for re-hearing, filed on June 11, 1953, was ordered stricken on June 17, 1953, in view of the fact that the remittitur had been ordered transmitted forthwith, pursuant to Rule 15 of the Rules Peculiar to the Business of the Court, 34A Wash. (2d) 7. Petition for appeal is presented to the court herewith, to-wit, on the 20th day of August, 1953.

The jurisdiction of the Supreme Court of the United States to review this cause by direct appeal is conferred by Title 28, Sec. 1257, Paragraph (2). The following cases sustain the jurisdiction of the Supreme Court to review the final decision of a state court when the validity of a state statute is upheld as consistent with the Constitution of the United States: *Largent* v. *Texas*, 318 U. S. 418 (where the state court was not explicit in overruling a challenge on federal grounds); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (where a state statute was held valid as applicable to a particular set of facts).

The federal issue was first presented by way of an Assignment of Error in appellant's brief on appeal, pursuant to Rule 43, Rules on Appeal, 34 A Wash. (2d) 47, as amended, and was called to the court's attention at pp. 26-27 of said brief, as follows:

> "To adjudge any person, or aggregate of persons guilty of a contempt, as a preliminary step to depriving him or them, either of liberty, or property or procedural rights, without personal notice to him or them, is, we respectfully submit, violative both of due process of law, and of the equal protection of the laws, i. e., the Fourteenth Amendment of the Constitution of the United States."

While it is the general rule in the State of Washington that an appellant must present to the trial court a theory

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of law intended to be relied upon appeal, this rule applies to cases where the cause is tried upon the merits: *Lally* v. *Graves*, 188 Wash. 561 (objection to introduction of evidence); *Smith* v. *King County*, 28 Wash. (2d) 917 (offer objection to instructions); *Muck* v. *Snohomish County P. U. D.*, 41 Wash. (2d) 81 (same); *State* v. *Davis*, 41 Wash. (2d) 535 (motion for new trial). The instant case, however, was not tried on the merits; the appellant made only a special appearance and moved to quash the service purported to be made pursuant to RCW 6.32.130. Upon this motion being denied, the appellant association did not proceed further, electing to present its full position on appeal from any contempt order which might arise out of the supplemental proceedings. This procedure has been recognized as an appropriate manner of presenting jurisdictional questions to the Supreme Court of Washington; *State ex rel Mangaoang* v. *Sup. Ct.*, 30 Wash. (2d) 392; and was affirmed by the Supreme Court of Washington, in the instant case, when it denied respondent's motion to dismiss its appeal from the adjudication of contempt: *Arnold* v. *Nat. Marine Cooks, etc.*, 41 Wash. (2d) 22.

Thus the first opportunity for the appellant association to present its theories was upon appeal from the contempt adjudication; see: *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-8; *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U. S. 74, 79; *Missouri ex rel. Missouri Ins. Co.* v. *Gebner*, 281 U. S. 313, 320; *Saunders* v. *Shaw*, 244 U. S. 317, 320; cf. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 162-4.

In appellant's opening brief, at page 8, specification of error No. 3, provides:

> "The court erred in directing a voluntary association to transfer assets to a receiver without having either

jurisdiction of such assets, *in rem*, or jurisdiction of some person in possession of, or with control over, such assets."

Question Presented

The basic issue presented by this appeal is whether a state court in proceedings supplemental to a judgment (said judgment having been appealed from but not superseded) may consistently with the requirements of the Fourteenth Amendment of the Constitution of the United States order a defendant voluntary association to transfer its assets (allegedly located in California) to a receiver appointed in Seattle, without service in said supplemental proceedings upon either officers or members of said association having custody or control of such assets, or without having attached said assets. It is appellant's submission that such an order deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

The statutes involved in this appeal are Title 6, Chapter 32, Sections 130, 180 of the Revised Code of Washington (RCW 6.32.130, 180.) RCW 6.32.180 provides as follows:

> "*A person* who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee made pursuant to any of the provisions of this chapter, *and duly served upon him, or an oral direction given directly to him* by a judge or referee in the course of the special proceeding, or to attend before a judge or referee according to the command of a subpoena *duly served upon him*, may be punished by the judge of the court out of which the execution issued, as for contempt. (1893 c 133 Sec. 18; RRS Sec. 630.)" (Emphasis added.)

ECW 6.32.130 provides in pertinent part as follows:

> "* * * an order requiring a *person* to attend and be examined * * * *must be served:*
>
> "(1) By delivering to the *person* served a certified copy of the original order and a copy of the affidavit on which it was made;
>
> "(2) Service upon a *corporation* is sufficient if made upon an officer to whom a copy of a summons must be delivered. Where an order is *personally served* upon a corporation, unless the officer to be served is specially designated in the order, the order may be served upon any person upon whom a summons can be served." (Emphasis supplied.)

Statement

Appellant is a voluntary association of some 6,000 members. On September 5, 1951, a judgment was entered against it, and its Seattle port agent, Joseph Harris, in the sum of $475,000.00, in a libel action based upon a letter sent by said Harris to the members of the appellant association and the officers of three other maritime unions, regarding the conduct of the 95 plaintiff-respondents, during a strike in 1948. Both the appellant association and Joseph Harris appealed from this judgment (Appeal No. 31984). Thereafter, on October 19, 1951, the respondents moved for an order in supplemental proceedings ordering the appellant association and its Seattle officers to appear for examination. The officers appeared and testified; but the union appeared only specially, contesting the Court's jurisdiction in the supplemental proceedings, and moved to quash the purported service as to it. This motion was denied. The Court found that it had jurisdiction of the appellant association and, while exonerating the individual officers personally served of any contempt, it adjudged the appellant union to be in contempt on April 4, 1952, for

failure to "assign, transfer, and deliver" $298,000.00 in government bonds to a receiver appointed by the Court. These bonds, and all of the principal assets, of the appellant association were found by the Court to be situated in San Francisco, California. There was no member of the association in the State of Washington who had custody or control of these assets.

The appeals from the money judgment, No. 31984, had been docketed for hearing on May 22, 1952. The respondents filed a motion before the Supreme Court of Washington to dismiss this appeal (of both the union and Joseph Harris), because of the contempt adjudication against the union. The appellant union duly perfected its appeal from this adjudication of contempt (Appeal No. 32180). On May 17, 1952, the Supreme Court of Washington struck Appeal No. 31984 (from the money judgment) from the calendar, pending determination of Appeal No. 32180 (from the contempt adjudication). The respondents thereupon attempted to have this latter appeal dismissed, but this motion was denied: *Arnold* v. *Nat. Marine Cooks, Etc.*, 41 Wash. (2d) 22.

On May 26, 1953, the Supreme Court of Washington filed its opinion, affirming the contempt adjudication: *Arnold* v. *Nat. Marine Cooks, Etc.*, 42 Wash. (2d) ——; 142 Wash. Dec. 590. The Supreme Court further ordered that the mandate be remitted forthwith, pursuant to Rule 15 of the Rules Peculiar to the Business of the Supreme Court, 34 A Wash. (2d) 7, and, in view of said remittitur, ordered appellant union's petition for re-hearing stricken from the files on June 17, 1953. Respondents, in the main appeal, (No. 31984), thereupon renewed their motion for the dismissal of both the appeal of the union and Joseph Harris, and on July 3, 1953, the Supreme Court of Washington, while it denied the motion to dismiss the appeal of Harris, ordered the appeal of the appellant union dis-

missed. Petition for certiorari to review this dismissal order (in Appeal No. 31984) is being sought in conjunction with the instant appeal from the adjudication of contempt, (Appeal No. 32180).

This dismissal of Appeal No. 31984 (from the money judgment) has admittedly been one of the primary objectives of the respondents since the institution of the supplemental proceedings upon which the contempt adjudication is founded. It is abundantly clear, therefore, that the instant contempt adjudication is, and was, merely the prerequisite to the order dismissing the appellant's appeal from the money judgment. No other action based upon the alleged contempt has ever been sought by the respondents.

The Questions Are Substantial

The Supreme Court of the United States has long held that it is violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States for any state to deprive persons of their property, without first having obtained personal jurisdiction over said persons or *in rem* jurisdiction of their property: *Pennoyer* v. *Neff*, 95 U. S. 714. In the instant action the only persons served in the supplemental proceedings within the State of Washington were the local, Seattle officers of the union. They were absolved of any contempt. Personal service was never obtained upon any person having custody or control of any assets ordered by the Court to be transferred to the receiver appointed by the Court. A copy of the order to transfer was delivered to the president of the association in Honolulu. Based upon the theory that service sufficient to institute the libel action was adequate in supplemental proceedings, the Superior Court of King County ordered that $298,000.00 in government bonds, alleged to be situated in San Francisco, and under the control of persons not before the Court, be transferred to the above mentioned

receiver in Seattle, Washington. In affirming the adjudication of contempt, for failure so to transfer, the Supreme Court of Washington held that actual notice of the supplemental proceedings, after service in a representative capacity in the main action, was sufficient to establish personal jurisdiction: See *Arnold* v. *Nat. Union Marine Cooks, Etc.*, 42 Wash. (2d) —; 142 Wash. Dec., 590. The Court concluded its opinion, *supra* at 596:

> "... The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

The Court thus confirmed the fact that the contempt adjudication was merely the preliminary step in depriving the appellant association of its right to appeal, and thereby affirming and making final a judgment against it, in the sum of $475,000.00, without ever considering the merits of the union's appeal from said judgment.

Appellant relied upon the case of *Hovey* v. *Elliott*, 167 U. S. 409, where the Supreme Court of the United States affirmed the decision of the New York Court of Appeals in refusing to enforce a District of Columbia judgment which had been obtained by default after the defendants' answer had been stricken because of the refusal to transfer the sum of $49,297.50. The Supreme Court of the United States, in affirming, held that to deprive the defendant of his right to defend the action was a denial of due process of law, and therefore the New York courts were not required to give the judgment full faith and credit. The Court in the *Hovey* case, *supra*, at 444, left open the issue presented by this case:

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> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit."

The Constitution of the State of Washington (Article 4, Section 1), RCW 4.88.010, and the Rules of the Supreme Court of Washington, Rules on Appeal, Rules 14, 34 A Wash. (2d) 20, grant the appellant the right of appeal. This fact completely distinguishes the case of *District of Columbia* v. *Clawans*, 300 U. S. 618 (where the Supreme Court held that the denial altogether of an appeal from a petty criminal offense does not violate due process); and *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; both relied upon by the respondents before the Supreme Court of Washington. In the *Hammond* case, the State of Arkansas entered a judgment by default on the basis of the refusal of the defendant to produce documents relevant upon the merits, on the theory that said refusal to produce was equivalent to a refusal to appear and answer and was not a *punishment* for contempt. The Supreme Court affirmed, distinguishing the *Hovey* case on that basis. The Supreme Court in the *Hammond* case, *supra*, at p. 353, expressly relied upon the opinion of the Supreme Court of Washington, drawing the same distinction: *Lawson* v. *Black Diamond Min. Co.*, 44 Wash. 26.

The failure to transfer assets in the instant case is crucially different from the failure to produce evidence before the trial court, and, therefore, the rationale of the *Hammond* case is completely inapplicable: *Duell* v. *Duell*, (CADC) 178 F. (2d) 683.

RCW 6.32.180, as above quoted, provides for the adjudication of contempt of any person who violates an order *duly served* upon him or *given directly* to him by the judge. RCW 6.32.130 provides, in pertinent part, how said orders *must be served* upon all by corporations:

> " • • • an order requiring a *person* to attend and be examined • • • *must be served*:
>
> "(1) By delivering to the *person* served a certified copy of the original order and a copy of the affidavit on which it was made;"

These statutes on their face appear to comply fully with the requirements of due process enunciated in *Pennoyer* v. *Neff*, 95 U. S. 714. Personal service must be had upon any person who is to be ordered by the Superior Court to transfer assets in supplemental proceedings. The section does not provide for the service of such orders as is allowed for the service of a summons and complaint in the institution of an action against a non-resident association. RCW 7.28.090 provides for service of summons and complaint:

> "If the suit is against a foreign . . . association doing business within this state, to any agent, cashier, or secretary thereof."

Both of these service provisions were enacted by the same legislature. The reason for the difference is evident. Supplemental proceedings are primarily for the purpose of discovery of assets: *Field* v. *Greiner*, 11 Wash. 8. If property belonging to the judgment debtor is found in his possession or in the possession of third persons the Court orders such persons to turn over the property. Suit against a voluntary association, however, is brought on the basis of the equitable doctrine of virtual representation: *Pacific Type Setting Co.* v. *I. T. U.*, 125 Wash. 273; *St. Germain* v. *Bakeries and C. Workers' Union*, 97 Wash. 292. In the one

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case, jurisdiction is obtained in a *representative* capacity and in the other, jurisdiction must be obtained over the *person* having custody or control of the assets.

Heretofore, the Supreme Court has recognized that personal or *in rem* jurisdiction must be obtained before a valid order may issue: *Junkin* v. *Anders*, 12 Wash. (2d) 48; *State ex rel. Timm* v. *Trounce*, 5 Wash. 304.

In the instant case, it is evident that while the court has jurisdiction of the appellant union in a representative capacity for the purposes of the main action, in the supplemental proceedings it acquired neither personal jurisdiction of any individual having control or custody of the joint assets of the members of the voluntary association or *in rem* jurisdiction of the assets themselves. Thus, the interpretation placed upon RCW 6.32.130, 180 by the Washington court clearly denies the appellant union of its property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States: See *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673.

For the above and foregoing reasons, the undersigned believe that the questions presented by this appeal are substantial and that they present issues of great public importance.

NORMAN LEONARD,
Counsel for Appellant.

WALTHEW, OSERAN & WARNER,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON—Filed May 26th, 1953

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, a voluntary association, Appellant

vs.

GEORGE ARNOLD, et al.

No. 32180

DEPARTMENT TWO

The National Union of Marine Cooks & Stewards Association, a voluntary association, is appealing from a judgment of the Superior Court of King County, holding the union in contempt of Court for refusal to comply with orders of the Court entered in connection with supplemental proceedings instituted in aid of a judgment in the sum of $475,000.00 previously rendered against the union. The significant facts in this case are as follows:

The respondents, as plaintiffs in the trial court, recovered a judgment totaling $475,000.00 on September 5, 1951, against the union in the King County Superior Court, and that law suit will be referred to hereinafter as the main action. There appears to be no dispute that jurisdiction of the union, or voluntary association was properly acquired in the main action by service of summons and complaint upon the union's business agent in Seattle. It should be pointed out here that the union has appealed from the judgment entered in the main action, which appeal is currently being held in abeyance by an order of the Supreme Court dated May 17, 1952, pending a disposition of the instant case—that is, the appeal of the union from the order holding the union in contempt of Court. The judgment in the main action never having been superseded, the respondents instituted supplemental proceedings on October 19, 1951, to discover assets for the purpose of satisfying

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the judgment previously rendered in the main action. Upon the basis of affidavit and motion, the trial court issued an order directing the union, its Seattle agent, Charles Nichols, and its acting Seattle agent, Robert Ward, to appear in Court for examination, and to produce certain described documents. The persons named in the order were restrained from transferring or secreting union assets. This order and a comparable supplemental order were served on Charles Nichols and Robert Ward. Service on the union was attempted by leaving additional certified copies of the orders with the named individuals, Ward and Nichols. The latter subsequently appeared and testified. They failed to produce the documents specified in the orders. Apparently, the union did not appear.

On December 11, 1951, the trial court ordered the union, Charles Nichols, and Robert Ward to show cause why they should not be held in contempt for failure to produce the specified documents. At a hearing on the return date of the show cause order, January 7, 1952, Nichols and Ward were absolved of the charge of contempt because they were not shown to be the official custodians of the documents. The union was adjudged in contempt of Court for its failure to comply with the previous orders served upon it, and was given until January 14, 1952, to purge itself of the contempt. The union appeared specially through its attorneys and moved to quash the purported service of the order requiring it to appear for examination in the supplemental proceeding. This motion to quash service was denied. At a hearing on February 15, 1952, on an order to show cause why a receiver for the union should not be appointed, the Court entered findings and conclusions of law as follows: That counsel for the union admitted jurisdiction had been acquired properly in the main action; that each of the orders to show cause was duly and regularly served upon the union by timely delivery of a certified copy thereof to an agent of the association in King County, Washington, by a person duly authorized to make such service; that the association had assets of $298,000.00 in government bonds which could be used to satisfy the judgment in the main

action; that the bonds were held by the union in its financial offices in San Francisco.

Based on its findings, the trial court appointed a receiver and directed the union to deliver the bonds to the receiver. A certified copy of this order to transfer the bonds to the receiver was delivered to Hugh Bryson, president of the union, in Honolulu. Similarly, a copy of the order was served upon Charles Nichols in Seattle. Upon failure of the union to deliver the bonds, an order was issued, requiring the union to show cause why it should not be held in contempt. This order was served on Charles Nichols in Seattle. A certified copy of the order was delivered to Hugh Bryson in San Francisco. The union did not appear on the return date and was adjudged in contempt for failure to comply with the order to transfer the bonds to the receiver. The union is here appealing from the adjudication of contempt. At this point, in order to complete the picture regarding this litigation, a cross reference to our decision in *Arnold* v. *National Union of Marine Cooks & Stewards Association*, 141 Wash. Dec. 20, 246 P. (2d) 1107, seems desirable. Therein, a motion to dismiss the union's appeal from the order of contempt on the grounds (a) that the contempt order was not appealable, and (b) that the appeal therefrom was not timely, was denied.

In the appeal as it is now before us, the union (appellant) urges four assignments of error, as follows:

"(1) The Court erred in denying appellant's motion to quash.

"(2) The Court erred in concluding that it has jurisdiction of the appellant association in supplemental proceedings.

"(3) The Court erred in directing a voluntary association to transfer assets to a receiver without having either jurisdiction of such assets, *in rem*, or jurisdiction of some person in possession of, or with control over, such assets.

"(4) The Court erred in adjudging the appellant association to be in contempt.

We find no merit in the union's assignments of error for the reasons hereinafter discussed.

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Apparently there is no dispute whatsoever that jurisdiction of the union was acquired in connection with the main action upon which the supplemental proceedings were based. Admittedly, there is some conflict of authority as to whether supplemental proceedings constitute a continuation of an original action or whether such supplemental proceedings constitute a new and independent action. 3 Freeman on Executions (3d ed.) 2151, Sec. 395; Riddle and Bullard, Supplementary Proceedings, (3d ed.) 14, Sec. II; 33 C.J.S. "Executions" 647 Sec. 345; 39 A.L.R. 1498, Annotation, "Necessity of new process to support proceedings supplementary to execution."

In *State ex Rel. Canal Tire Co.* v. *Hall,* 120 Wash. 449, 450, 207 Pac. 685, the following language is found:

"We held in *Flood* v. *Libby,* 38 Wash. 366, 80 Pac. 533, 107 Am. St. 851, that proceedings Supplementary to execution are not an independent proceeding but are merely auxiliary to the original action and a continuation thereof. Our statute (Rem. Complied Stat., Sec. 613), provides that the order shall run to the sheriff where it is desired to arrest the debtor, but there is no provision in the chapter on this subject directing that the service of the order involved here shall be made in any manner different from any other order of the Court in the course of an action."

In *Turner* v. *Holden,* 109 N. C. 182, 13 S. E. 731, the defendant entered a special appearance attempting to dismiss supplemental proceedings on the ground there had never been proper service of process. The Supreme Court of North Carolina rejected defendant's contention, distinguishing between the necessity for service of process and notice, as follows (p. 184):

"The Court had jurisdiction of the defendant by virtue of the service of the summons, the original process, and his appearance in the action. The action was not ended for all purposes when the plaintiff obtained his judgment; it remained, and remains, current for all proper purposes in the enforcement of the judgment by the ordinary execution and other appropriate means, including proceedings

supplementary to the execution. The latter are not separate from and independent of the action; they are incident to and part of it; they constitute and are no more than a means allowed by the statute in the action whereby to reach the property of the defendant and enforce satisfaction of the judgment. *Hence, they are not begun by original process, a summons . . .*

". . . The Court has jurisdiction in cases like this of the party to the action, and it is deemed sufficient to give him notice in the way prescribed of any motion or proceeding in the action. It is the duty of parties to actions to be on the alert at all times, until the same shall be completely ended . . ."

We affirm the position consistently adhered to in this jurisdiction that supplemental proceedings are not a new and independent action but are merely a continuation of the original or main action and are auxiliary thereto. *Field* v. *Greinr*, 11 Wash. 8, 39 Pac. 259; *Flood* v. *Libby*, 38 Wash. 366, 80 Pac. 533; *State ex Rel. Canal Tire Co.* v. *Hall, supra; State ex Rel. McDowall* v. *Superior Court*, 152 Wash. 323, 277 Pac. 850; *Junkin* v. *Anderson*, 12 Wn. (2d) 58, 120 P. (2d) 548 and 123 P. (2d) 759.

We will now discuss the contention of the union that supplemental proceedings are statutory in nature and not applicable to a voluntary association. In support of this contention the union focuses attention upon the word "person", appearing in R. C. W. 6.32.180. It is claimed that the term "person", as used in the cited statute providing for punishment as for contempt for noncompliance with orders in supplemental proceedings, should be narrowly construed; that the term is not applicable to a union or voluntary association. A casual reference to R. C. W. 6.32.010, the basic statutory provision respecting supplemental proceedings, shows that such proceedings are authorized against "any judgment debtor." We think that the breadth of this language is controlling against any tendency to strictly construe the term "person", as it appears in the above-cited contempt or sanction section of the statutes. It has long been settled in this state that unions may sue and be sued.

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Where judgments are recovered by or against unions, they are in no different category than other judgment creditors or judgment debtors insofar as supplemental proceedings may be concerned. Assuming that the term "person" might be narrowly construed, in accordance with the union's contention, it does not follow that the Court would be completely without power to enforce orders entered in connection with supplemental proceedings. In connection with a creditor's bill in equity—the legal precursor in numerous jurisdictions of statutes providing for supplemental proceedings—the Court would have had power to cite for contempt, irrespective of statutory authority. The same reasoning or analogy is persuasive in the instant case.

Appellant points out that R. C. W. 6.32.130 provides how orders in supplemental proceedings will be served on "persons" and "corporations". Appellant then emphasizes the fact that this section makes no express provision for service of orders in such proceedings where the judgment debtor is a *voluntary association.* Based upon this, it is contended that the legislature must have intended that voluntary associations were not to be subject to supplementary proceedings. We cannot agree. Statutes providing for supplemental proceedings are remedial in nature. They are intended to aid in the enforcement of judgments previously obtained to make them effective as a practical matter; or, in other words, to make them worth more than the paper on which they are written. With the remedial purpose of such a statute in mind, the immunity as to unions, contended for here, must rest on more explicit language than that here involved and certainly should not be inferred merely from the fact of a legislative omission in providing for the manner in which orders will be served on voluntary associations. *Hamilton* v. *Delaware Motor Trades, Inc.*, 34 Del. 486, 155 Atl. 595. The legislature has explicitly exempted certain types of property and the property of certain classes of judgment debtors, R. C. W. 6.32.250. If it had been intended that voluntary associations were to be exempt or immune from supplemental proceedings, the legislature would have so provided, explicitly.

Under the circumstances, it must be held that the notice involved in the instant case adequately apprised the appel-

lants of the pending supplemental proceedings. *Seyfert* v. *Edison*, 47 N. J. L. 428, 1 Atl. 502; *Turner* v. *Holden*, *supra*.

We think that the union was adequately advised and was given proper notice in connection with the show cause orders of the trial court. The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed, unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver.

FINLEY, J.

We concur:

SCHWELLENBACH, J.;
HILL, J.;
HAMLEY, J.;
OLSON, J.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 342

NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION,

Appellant,

vs.

GEORGE ARNOLD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AND FOR DAMAGES AND DOUBLE COSTS.

SAMUEL D. BASSETT,
Counsel for Appellees.

JOHN GEISNESS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 342

NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION, A VOLUNTARY ASSOCIATION, *Appellant*,

vs.

GEORGE ARNOLD, ET AL., *Appellees*

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AND FOR DAMAGES AND DOUBLE COSTS.

Motion to Dismiss or Affirm and for Damages and Double Costs

The appellees respectfully move the court that the appeal herein be dismissed or the judgment appealed from affirmed, with damages and double costs, because no substantial federal question is involved, no federal question was presented or passed upon in the state court, and the appeal is frivolous and vexatious.

Statement Supporting Motion and Opposing Jurisdiction

1. No Substantial Federal Question

This Court will not retain jurisdiction if no substantial federal question is presented. *Seaboard Air Line Ry. Co.* v.

Watson, 287 U. S. 86, 77 L. Ed. 180. Here, the suggestion of a federal question is frivolous.

Appellant voluntary association is a judgment debtor. After judgment, proceedings supplemental to execution were initiated. These proceedings are not independent proceedings, but are merely auxiliary to the original action, and a continuation thereof. (Washington Supreme Court opinion herein, 142 Wn. Dec. 590, 257 P. (2d) 629, and cases therein cited.) Jurisdiction to obtain the money judgment was conceded. The various steps in the supplemental proceedings were taken by orders to show cause, and culminated in an adjudication that the appellant was guilty of contempt for failure to comply with an order directing transfer of certain bonds situated in California to a receiver in Washington. After appellant's motion to quash, the trial court found:

> "Each of the Orders to Show Cause issued in the supplemental proceedings herein was duly and regularly served upon the defendant association by timely delivery of a certified copy thereof to an agent of said association in King County, Washington, with general authority to act for said association in the State of Washington, to-wit: upon the Seattle Agent or the Acting Seattle Agent of said association. Said Order to Show Cause why a receiver should not be appointed was also duly and regularly served upon said defendant association by timely delivery of a copy thereof to a Secretary of counsel of record for said defendant association in the above entitled cause in the office of said counsel on a regular business day during regular business hours. At all times herein mentioned said defendant association has been regularly engaged in business in Seattle, King County, Washington, and is still regularly engaged in business therein. At all times herein mentioned defendant union has collected and still collects dues, fines and assessments in Seattle, King County, Washington, at the rate of approximately

> $25,000.00 each six months and at all times herein mentioned said defendant remitted and still remits said receipts weekly to the National office of said defendant in San Francisco, California" (Transcript in State Supreme Court 21-22).

This finding has not been attacked. Furthermore, as the trial court recited, counsel for appellant admitted "that service of said orders to show cause was made upon the defendant association in the same manner as service of summons and complaint in the main action upon said defendant and that said service of said summons and complaint was adequate to give the court jurisdiction of said main cause and of the defendant association as a defendant therein." In addition to the foregoing, as recited in the opinion below, a certified copy of the order directing transfer of the bonds to the receiver was delivered to the president of appellant in Honolulu, and thereafter, a certified copy of the order requiring the appellant to show cause why it should not be adjudged in contempt was delivered to appellant's general agent in Washington and to its president in San Francisco.

Appellant now contends that the supplemental proceedings lacked due process for failure to serve, within the State of Washington, notice upon officers or members of the association having custody or control of the assets, and without attachment of the assets. This contention is frivolous. It is obvious that appellant was accorded due process under the tests stated in *International Shoe Co.* v. *Washington*, 90 L. Ed. 95, 326 U. S. 310.

2. Federal Question Not Presented or Decided

Even if a federal constitutional question exists in the case, it will not be considered by the United States Supreme Court because it was not presented or decided in the state court. *Wilson* v. *Cook*, 327 U. S. 474, 90 L. Ed. 793.

No federal question was decided by the state court in the instant case, nor was any question presented to the state court. To present a federal question to a state court so as to preserve it for appeal to the United States Supreme Court, the federal claim must be asserted at the proper time and in the proper manner by appropriate action under the state system of pleading and practice. *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, 63 L. Ed. 722.

The appropriate state rule of practice, applicable to constitutional claims as well as to other contentions, is that the Supreme Court of the State of Washington will not consider questions not raised before the trial court. *Unemployment Compensation Department* v. *Hunt*, 17 Wn. (2d) 228, 135 P. (2d) 89. No constitutional question was raised in the trial court. Appellant suggests that it could not raise the constitutional question in the trial court because of a special appearance and motion to quash made by appellant. However, this did not preclude its constitutional argument.

Appellant's constitutional contention is that the supplemental proceedings against it were instituted and conducted without notice sufficient to afford due process. This would have been an apropriate argument in support of its motion to quash, particularly as the Supreme Court of the State of Washington has expressly recognized that a court that proceeds without sufficient notice to constitute due process proceeds without jurisdiction. *State, ex rel. Adams* v. *Superior Court*, 36 Wn. (2d) 868, 220 P. (2d) 1081. In addition, under Washington practice, the appellant was not required to stand upon its motion to quash in order to take advantage of its special appearance. Appellant could have preserved its special appearance and still litigate in the trial court every conceivable defense, without waiving its motion to quash. *Alto* v. *Hartwood Lumber Co.*, 135 Wash. 368, 237 Pac. 987.

Nor was the constitutional question adequately raised in the state appellate court. Under the state rules of practice, in a brief of appellant, "Each error relied on shall be clearly pointed out and discussed under appropriate headings," (Rules on Appeal, 34 A, Wn. (2d) P. 45, Rule 42). We do not find that a federal question was raised, as asserted by appellant, by way of an assignment of error in appellant's brief in the state appellate court. The Constitution is not mentioned. The only claimed error "clearly pointed out and discussed under appropriate headings" is that the trial court proceeded without warrant of state law. The only quotation from the state court proceedings set forth by appellant as a claim of federal right is a rhetorical statement at the end of its state court brief under the caption "Conclusion", and here appellant does not indicate that it invokes the Constitution of the United States and relies upon it.

Finally, independent of state rules, the question whether a federal constitutional claim was distinctly and sufficiently brought to the notice of the state court is itself a federal question (*Carter* v. *Texas*, 44 L. Ed. 839, 177 U. S. 442) and the requirement is not met by a party unless he "unmistakably declares that he invokes, for the protection of his rights, the Constitution * * * of the United States." *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 112, 46 L. Ed. 829. Appellant made no such declaration.

3. Damages and Double Costs

Under 28 U. S. C. A., Section 1912 (62 Stat. 954, c. 646) "When a judgment is affirmed by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." Under this section, the United States Supreme Court has power to impose just damages

upon the affirmance of any judgment or decree, for delay, and a penalty may be imposed upon dismissal just as upon an affirmance. *Wagner Electric Manufacturing Co.* v. *Lynden*, 262 U. S. 226, 67 L. Ed. 961 (construing R. S. 1010, 28 U. S C. 1940, Section 878, from which the present Section 1912, Title 28, U. S. C. was derived without material change). Since the federal question relied upon is unsubstantial and frivolous, it conclusively follows that the appeal was prosecuted for delay. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 57, L. Ed. 140.

We submit that the appeal is so wholly without merit as to call for the imposition of damages and double costs pursuant to the statute.

Respectfully submitted,

SAMUEL B. BASSETT,
Attorney for Appellee.

JOHN GEISNESS,
Of Counsel.

NOVEMBER 16, 1953.

Per Curiam Decision.

No. 342. NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION *v.* ARNOLD ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. The motion for damages and double costs is denied. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. *Norman Leonard* for appellant. *Samuel D. Bassett* for appellees. Reported below: 42 Wash. 2d 648, 257 P. 2d 629.

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